NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Dillon Companies, Inc. d/b/a City Market, Inc. *and* United Food and Commercial Workers, Local 7, AFL–CIO. Cases 27–CA–17679, 27–CA–17851, and 27–CA–17957

December 15, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On May 23, 2003, Administrative Law Judge Thomas M. Patton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's exceptions, and the Charging Party filed an answering brief to the Respondent's and General Counsel's exceptions. The General Counsel filed a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act when, during the organizing campaign, it promulgated a no-solicitation rule. Although that rule was facially valid, the Respondent instituted it specifically in response to its employees' union organizing activities. Further, the Respondent failed to show that it promulgated the rule to maintain production and discipline.[2]

The Respondent posted a "No-Solicitation Policy" and "Interoffice Memorandum" on an employee bulletin board in the store's breakroom on February 8, 2002. This posting came after the Union had resumed an organizational campaign. The Union had lost a representation election held in the prior August. The Union had filed objections, and the Board had ordered a rerun election.[3] Store Manager Peter Palmer testified that the Respondent posted the policy in response to two employees' complaints of organizing efforts by union supporters. We agree with the judge's finding that there is no evidence that the solicitation attempts that preceded the posting involved unlawful or unprotected activity.

Our dissenting colleague confuses the presumption regarding the *legality* of a no-solicitation rule with the presumption regarding the *timing* of such a rule. Under *Peyton Packing*, 49 NLRB 828 (1943), and *Republic Aviation Corp. Co. v. NLRB*, 324 U.S. 793 (1945), rules like the one here are presumed to be lawful on their face. That presumption is not rebutted here, and thus the rule is lawful. However, this case involves the *timing* of the promulgation of the rule. Where, as here, the rule has lain dormant for a substantial period of time, and is resurrected only in the context of a union campaign, there is a reasonable presumption of a nexus between those two events. In addition, if the timing can be explained by matters apart from the campaign, the Respondent, as the promulgator, is in the best position to adduce evidence of that explanation. Phrased differently, once it is shown that the rule was promulgated in the context of a union campaign, the burden of explanation lies with the employer.

Here, the Respondent has offered as an explanation, only the complaints of employees. However, there is no showing that these employees were solicited in coercive ways, nor is there a showing that they were solicited during working time. In short, since the reason for the resurrection of the policy was protected concerted activity, i.e., solicitation not shown to be unprotected, the resurrection of the policy was unlawful.

Contrary to the suggestion of our colleague, we do *not* say that the timing of the policy (i.e., during a union campaign) is sufficient to establish that the policy was caused by the campaign. We merely say that, upon that showing of timing, the burden is on the employer to explain the timing.

In the instant case, the Respondent's explanation of the timing is that it received complaints by employees. Although our colleague says that these were "legitimate"

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that there are no exceptions to the judge's recommended dismissals except for his dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by its increased use of security guards to engage in surveillance of its employees' union activities.

[2] *NLRB v. Roney Plaza Apartments*, 597 F. 2d 1046, 1049 (5th Cir. 1979), enfg. 232 NLRB 409 (1977) ("promulgation of a [new rule] upon the commencement of a union organizational campaign is strong evidence of discriminatory intent," although the employer may demonstrate that imposing the new rule "was justified because the union campaign brought about substantial work disruption.")

[3] The rerun election had not yet been held.

complaints, they were complaints about protected solicitations by fellow employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dillon Companies, Inc. d/b/a City Market, Inc., Buena Vista, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 15, 2003

Robert J. Battista, Chairman

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

The issue here is whether an employer's promulgation of a facially valid no-solicitation rule at the onset of, and/or in response to, a union organizing campaign, interferes with the Section 7 rights of its employees and is therefore violative of Section 8(a)(1) of the Act. My colleagues answer in the affirmative and therefore adopt the judge's finding of a violation. I disagree. Since the Respondent's no-solicitation policy was entirely lawful, expressly permitting, for example, solicitations during employee meal and breaktimes, its posting prior to the holding of a second election was not, without more, unlawful. In reaching a contrary conclusion, the judge erred by relying solely on the timing of the Respondent's posting of its lawful "Solicitation Policy" to infer a discriminatory purpose in its promulgation. As discussed herein, the administrative law judge's finding that the promulgation of the no-solicitation policy was for a discriminatory purpose and was therefore unlawful is at odds with settled Supreme Court and Board law. My colleagues therefore err in adopting that finding.

A. Facts

An election was held among the Respondent's employees at its Buena Vista, Colorado store, the only store at issue here, on August 2, 2001. Although the precise number of unit employees is not known, the judge described the store as "quite small." After losing the election, the Union filed objections. On December 20, 2001, the Board ordered that a second election be held. On February 8, 2002, and before a second election, the Employer posted its "Solicitation Policy" and an "Interoffice Memorandum" on an employee bulletin board in the store's breakroom.[1] The "Solicitation Policy" had been included in the Employer's personnel manual since at least 1995, but had not previously been announced to employees.

B. Judge's Findings

The complaint alleged that the Respondent's February 8 "promulgation or re-promulgation" of its solicitation policy was to discourage its employees from assisting the Union and was therefore violative of Section 8(a)(1) of the Act.

In finding the violation, the judge explained that the General Counsel did not contend that the solicitation policy was invalid on its face, but rather that the posting of the policy was unlawful because of its timing vis-à-vis the second representation election. Citing, inter alia, *Harry M. Stevens Services*, 277 NLRB 276 (1985), enfd. mem. 793 F.2d 1288 (5th Cir. 1986), for the proposition that "[a]n otherwise valid rule restricting solicitation or distribution violates the Act when it is promulgated to interfere with the employee right to self-organization rather than to maintain production and discipline," the judge found that the General Counsel had established a "prima facie case" that the Respondent promulgated the solicitation policy to interfere with the employees' right to organize.

The administrative law judge further found that the Respondent failed "to rebut" the General Counsel's prima facie case. Citing, inter alia, *Bank of St. Louis*, 191 NLRB 669 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972), for the proposition that "[t]he Act protects persistent union solicitation even when it disturbs or annoys the employees who are solicited," the judge found that the evidence did not show that the Respondent posted the policy to maintain production and discipline. In reaching this conclusion, the judge found, in effect, that although Palmer, the Respondent's store manager, "conceded" that the solicitation policy was posted in response to the complaints of two employees regarding the Union's organizing efforts, those complaints did not justify the posting of the solicitation policy. This was so, the judge reasoned, because there was "no evidence that the solicitation attempts that preceded the posting involved unlawful conduct or activity that was by its nature inherently unprotected."

C. Analysis

As an initial matter, I agree with the judge and my colleagues that the Respondent promulgated its "Solicitation Policy" when it posted the policy in the employees'

[1] The Respondent's "Solicitation Policy" and its "Interoffice Memorandum" are fully set out at sec. II E(a) of the judge's decision and are therefore not repeated here.

breakroom in February. For although the policy had been included in the Respondent's personnel manual since at least 1995, it was first announced—and first made known—to employees in February 2002. Even so, however, and contrary to my colleagues, I would reverse the judge's finding that the Respondent's promulgation of the "Solicitation Policy" violated Section 8(a)(1) of the Act. I would do so for two reasons. First, there is no evidence to support an inference that the Respondent intended to interfere with its employees' right to organize when it posted its solicitation policy. Second, such evidence as there is actually supports the Respondent's argument that it posted the solicitation policy in order to maintain production and discipline at the store.

1. The judge erred in finding that the General Counsel established a prima facie case that the promulgation of the "Solicitation Policy" was unlawful

Since the "Solicitation Policy" itself is facially valid, an analysis of the lawfulness of the Respondent's *promulgation* of its solicitation policy must begin with the presumption that it was, in fact, lawfully promulgated. That presumption can only be overcome by showing that the solicitation policy was promulgated for discriminatory reasons. For, as the Board explained in *Peyton Packing Co.*, 49 NLRB 828, 843 (1943) (emphasis added):

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. *Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.*

Given this analytical framework, the relevant inquiry concerns what evidence the judge relied on to overcome this presumption and find the promulgation unlawful. In making this inquiry, one must be mindful of the Supreme Court's admonition in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945) (emphasis added):

> An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred *may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven.*

What evidence, then, does the judge rely on to establish that the promulgation was itself unlawful? Or, put another way, on what "proven facts," does the judge rely to find that the General Counsel has established a prima facie case that the Respondent promulgated its "Solicitation Policy" for a "discriminatory purpose"?

The answer is simply stated: the Respondent posted its "Solicitation Policy" prior to the holding of a second election. From this "proven fact," the judge found that the *timing* of the promulgation, standing alone, provided sufficient evidence from which to infer that the Respondent's promulgation of its "Solicitation Policy" was for a "discriminatory purpose." And it is from this "evidence" alone that the judge concluded that the General Counsel had established a prima facie case that the promulgation of the "Solicitation Policy" was unlawful. In so doing, the judge erred. My colleagues only compound that error by adopting the judge's erroneous finding that the timing of the promulgation evidenced a discriminatory purpose for the additional reason, also erroneous, that "the Respondent instituted [the no-solicitation rule] specifically in response to its employees' union organizing activities."

To understand the judge's analytical error, one need only ask how the posting of a facially valid rule such as the Respondent's "Solicitation Policy," standing alone, can be found unlawful when the Board itself finds it to be presumptively lawful? The simple answer is that it cannot be unlawful—and, as the Supreme Court's reasoning in *Republic Aviation Corp. v. NLRB*, 324 U.S. at 793, clearly demonstrates, this is true even assuming that the rule is promulgated in response to a union organizing campaign.

In *Republic Aviation*, the Court considered, as relevant here, the validity of the employer's no-solicitation policy. In doing so, the Court explained that the case brought to the Court for review

> the action of the National Labor Relations Board *in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.* Like so many others, *these rights are not unlimited* in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society. Id. at 797–798. [Emphasis added.]

In its ensuing discussion of the lawfulness of the employer's no-solicitation policy, the Court quoted with approval the language set out above from the Board's *Peyton Packing* decision and relied on that language to find that the Board

had there "succinctly expressed the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation." Id. at 793 fn. 10. In sum, the Court recognized that some limitation on employees' right to organize, here soliciting on behalf of the Union, is permissible because that limitation ensures that an employer can maintain "proper discipline" and production in the workplace. Thus, while one might construe the limitation on the right to solicit as "interference" with employees' right to organize, it is an "interference" which the Board, with Court approval, permits. But if "[i]t is . . . within the province of an employer to promulgate and enforce [such] a rule," when, in fact, the policy is promulgated is irrelevant to the analysis of whether the promulgation is lawful. And therefore the *timing* of the promulgation, standing alone, cannot stand as a "proven fact" from which to infer that the policy was adopted for a "discriminatory purpose" and was therefore unlawful.

Board law is not to the contrary. As the judge explained in *Montgomery Ward & Co.*, 227 NLRB 1170, 1174 (1977) (emphasis added), "the timing of an otherwise valid rule's promulgation, to coincide with the start of organizational activities, *standing alone*, would . . . be insufficient to establish its unlawfulness." However, the judge there went on to find the store's promulgation unlawful because it was not "standing alone." Rather, the judge found that the promulgation was part of "a pattern within the [employer's] organization [of] simultaneously posting [the rule] for the general population of employees while reading it to the leading union adherents, in the locus of authority with the employee's immediate supervisor standing by." Id. The judge concluded that the employer violated Section 8(a)(1) because he found that "[s]uch a procedure would reasonably tend to discourage an employee from engaging in any activities on behalf of the union, particularly where the employee was neither observed in, or accused of, violating the policy written." Id. And in *Harry M. Stevens Services*, 277 NLRB at 276, which, as noted above, the judge relied on for the proposition that "[a]n otherwise valid rule restricting solicitation or distribution violates the Act when it is promulgated to interfere with the employee right to self-organization rather than to maintain production and discipline," the Board relied on the fact that the employer there had unlawfully discharged an employee for soliciting on behalf of the union only 3 days before it promulgated its no-solicitation rule to find that the rule was promulgated for discriminatory reasons. Finally, in *RCN Corp.*, 333 NLRB 295, 301 (2001), also relied on by the judge, in finding the employer's no-solicitation policy unlawful, the judge there found that the policy was discriminatorily enforced.

Clearly, then, the judge erred by relying on the timing of the promulgation alone as a "proven fact" from which to infer that the Respondent promulgated its "Solicitation Policy" for a "discriminatory purpose." Contrary to the judge's findings which my colleagues adopt, the General Counsel has not established a prima facie case that the Respondent's promulgation of its "Solicitation Policy" was unlawful.

2. The judge erred in finding that the Respondent failed to rebut the General Counsel's prima facie case

Even assuming, arguendo, that the General Counsel established a prima facie case that the "Solicitation Policy" was promulgated for a "discriminatory purpose," I find that the Respondent successfully rebutted that prima facie case by establishing that it promulgated its "Solicitation Policy" to maintain production and discipline at the store.

In finding that the Respondent failed to rebut the prima facie case, the judge, as explained above, applied the analytical framework set out in *St. Louis Bank*, supra, which the Board employs to determine the lawfulness of an employer's instructions to employees that they should notify the employer if they are badgered, harassed, and/or threatened by union supporters or organizers during a union campaign. Under this analysis, the Board finds requests that employees report conduct broadly defined as badgering or harassment unlawful because they "would tend to restrain the union proponent from attempting to persuade any employee through fear that his conduct would be reported to management." *Bank of St. Louis*, 191 NLRB at 673. This is so because such statements

> have the "potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner *subjectively* offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities." *Arcata Graphics*, 304 NLRB 541, 542 (1991), quoting *W. F. Hall Printing Co.*, 250 NLRB 803, 804 (1980). [Emphasis added.]

The judge's reliance on such an analysis here is misplaced. For the Respondent's "Solicitation Policy" did not contain a request that employees notify it if they were harassed or badgered by union supporters or organizers.[2] Nor were the employees whose complaints prompted the Respondent's

[2] I note, however, that the Respondent's "Interoffice Memorandum" did contain such a request to report harassment. I agree with my colleagues that this request was unlawfully broad and vague under current Board law.

promulgation of its "Solicitation Policy" responding to such a request. In these circumstances, whether "the solicitation attempts that preceded the posting involved unlawful conduct or activity that was by its nature inherently unprotected," is irrelevant to the issue of whether the Respondent's promulgation of its "Solicitation Policy" was lawful. What is relevant is that the Respondent, in the judge's words, "conceded" that it promulgated the "Solicitation Policy" in response to employee complaints. And however subjective the reaction of these employees to the conduct complained of, however protected the conduct of the soliciting employees/union supporters may have been, the Respondent had the right to post its "Solicitation Policy" in response to the legitimate, albeit subjective, concerns and complaints of its employees. For, after all, the Respondent's purpose in promulgating its "Solicitation Policy" was to maintain store production and discipline at its own store and among its own employees, and not, as it were, at some abstraction of a reasonable store and among reasonable employees not its own.[3] Thus, assuming arguendo that the General Counsel established a prima facie case that the "Solicitation Policy" was unlawfully promulgated, I find that the Respondent has successfully rebutted that prima facie case.

And the finding that the Respondent has successfully rebutted the General Counsel's prima facie case necessarily disposes of my colleagues' erroneous claim, set out above, that the timing of the promulgation evidenced a discriminatory purpose because "the Respondent instituted [the no-solicitation rule] specifically in response to its employees' union organizing activities." In support of their claim, my colleagues first accuse me of "confus[ing] the presumption regarding the *legality* of a no-solicitation rule with the presumption regarding the *timing* of such a rule" (emphasis in original). They then find a violation relying on the following analysis: since the Respondent "resurrected" its no-solicitation policy "only in the context of a Union campaign," there must be a "nexus" between the promulgation of the no-solicitation rule and the resumption of the union campaign, and that nexus is sufficient to establish a discriminatory purpose in the promulgation of the no-solicitation policy. In finding a violation based on such an analysis, it is my colleagues who are confused.

Even if the Respondent promulgated its no-solicitation policy during the union campaign, such a finding based on the *timing* of the promulgation is insufficient, for the reasons set out above, to establish that the no-solicitation policy was promulgated for a discriminatory purpose and was therefore unlawful. In reaching a contrary conclusion, the judge erred. Now my colleagues compound that error by asserting that discriminatory purpose is established here not merely by the timing of the promulgation, but also by the fact that the promulgation was in response to employees' union-organizing activities. In making this assertion, my colleagues confuse context with cause. For, as explained above, the Respondent promulgated its no-solicitation policy in response to legitimate employee complaints.[4] Thus, the true "nexus" here is between the promulgation and the complaints. As explained above, since the Respondent has the right to establish rules to ensure production and maintain discipline, the promulgation of the no-solicitation policy was not unlawful. And, in these circumstances, the mere fact that the Respondent promulgated the rule in the context of a union campaign cannot render the lawful promulgation unlawful. Only by confusing cause and context, and by creating a "nexus" where none exists, can my colleagues find otherwise. In doing so, my colleagues only compound the judge's error with their own.

Finally, I simply note here that the judge in the *Bank of St. Louis* case, after finding unlawful the employer's request that employees report constant badgering by union proponents, observed that "[i]n the interest of preventing disruption of work, [the employer] could, of course, lawfully forbid the solicitation of union memberships in the bank's working areas during working time[.]" Id. at 673. And that is, of course, precisely what the Respondent did here.

[3] That the Respondent's concern for maintaining production and discipline was legitimate is shown by the fact that two employees in the store, which, as noted above, the judge described as "quite small," complained to the employer. Cf. *Mack's Supermarkets*, 288 NLRB 1082, 1097 (1988), where the judge found that the employer did not institute its no-solicitation rule to maintain production and discipline because only two employees in a work force of approximately 128 employees filed complaints and one of those complaints concerned matters that took place away from the store.

[4] My colleagues imply that the employee complaints were not legitimate because "they were complaints about protected solicitations by fellow employees." But whether the complaints were triggered by protected solicitations is simply not relevant to the inquiry. What is relevant is that the complaints were made in *good faith* (see fn. 3 above and accompanying text), and that, after all, the Respondent did not forbid such solicitations but only promulgated a rule that would ensure that such solicitations *did not unduly interfere with work*. In these circumstances, the Respondent's promulgation of its no-solicitation rule was lawful. It is nothing more nor less than the application to the everyday workplace of that "working out [of] an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and *the equally undisputed right of employers to maintain discipline in their establishments*" contemplated by the Supreme Court in *Republic Aviation Corp. v. NLRB*, 324 U.S. 797–798 (1945) (emphasis added). Viewed in this light, my colleagues' "adjustment" of these two competing rights cannot stand, for their "adjustment" is nothing more than the exaltation of the former right at the expense of the latter.

D. Conclusion

For all the reasons set out above, I find that the Respondent did not violate Section 8(a)(1) of the Act by promulgating its "Solicitation Policy" on February 8, 2002. I further find, therefore, that the Respondent did not violate the Act by cautioning employees in its February 8, 2002 "Interoffice Memorandum" that they risked discipline and termination if they engaged in union organizing activities in violation of the Respondent's lawful "Solicitation Policy" or by requesting in the memorandum that employees report solicitation in violation of the policy.

Dated, Washington, D.C. December 15, 2003

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

Michael Cooperman, Esq., for the General Counsel.
Gustav V. Achey, Esq. and *Karin Ranta Curran, Esq.*, of Denver, Colorado, for the Respondent.
Bradley C. Bartels, Esq., of Wheat Ridge, Colorado, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. This case was tried in Buena Vista, Colorado, on October 8–10, 2002.[1] The charge in Case 27–CA–17679 was filed October 26, 2001. The charge in Case 27–CA–17851 was filed February 14, 2002, and was amended on June 20, 2002. The charge in Case 27–CA–17957 was filed April 9, 2002. A consolidated complaint issued June 25, 2002, and was amended September 12, 2002.[2] The Respondent denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party and the Respondent, I make the following

II. FINDINGS OF FACT

A. Jurisdiction

Dillon Companies, Inc. d/b/a City Market, Inc. (the Employer or Respondent) operates retail grocery stores, including a store in Buena Vista, Colorado (the Store), the only facility involved in this proceeding. The Respondent admits, the record establishes, and I find that the Respondent meets the Board's standards for asserting jurisdiction and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The name of the Respondent appears as corrected at the hearing.
[2] At the opening of the spelling of the name of Milton A. Christensen appearing in the complaint was corrected by an amendment to the complaint.

B. The Labor Organization

The Respondent admits, the record establishes, and I find that United Food and Commercial Workers, Local 7, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

C. Background

In early 2001, the Union began an effort to organize a unit of employees at the Store. The Respondent campaigned against the Union. The Union filed a petition in Case 27–RC–8117 and a Decision and Direction of Election issued on July 3, 2001.[3] A representation election was conducted on August 2. The Union lost the election and filed objections. On December 20, following a hearing on objections, the Board directed the holding of a second election. At the time of the hearing before me the second election had not been held. The record does not disclose the unit description or the number of unit employees. It appears to have been a typical retail grocery unit. The Store was described as being quite small. The day-to-day supervision of the Store was by the store manager and assistant managers. The record suggests that some assistant managers may have been eligible voters. The record does not show that there were any other statutory supervisors involved in the day-to-day operation of the Store.

In disposition of Case 27–CA–17679 the Respondent and the Union entered into a Board informal settlement agreement approved by the Regional Director on January 8. The record demonstrates and the General Counsel acknowledges on brief that the settlement agreement was intended to resolve charges that the Employer violated Section 8(a)(1) in June and July by threatening employees on several occasions with the loss of existing wages and benefits if they selected the Union as their representative and by engaging in surveillance of employees to discourage union activity. The consolidated complaint includes an order vacating and setting aside the settlement agreement and alleges 8(a)(1) violations in June and July.

The consolidated complaint avers that by 8(a)(1) violations in February and March the Respondent violated the settlement agreement. The answer denies any unfair labor practices, avers that the settlement agreement was not violated and that the settlement agreement should not be set aside. At the opening of the trial the Respondent again asserted that the settlement agreement had not been violated and contended that the settlement agreement was a bar to the complaint allegations of Section 8(a)(1) violations in June and July. The complaint allegations of independent Section 8(a)(1) conduct are in 18 paragraphs numbered 5(a) through 5(s). There is no paragraph 5(c) because it was amended out of the complaint at the hearing on the motion of the General Counsel.

D. Introduction

In *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978), the Board held that "a settlement, if complied with, will be held to bar subsequent litigation of all prior violations except where they were not known to the General Counsel or readily discov-

[3] Unless otherwise noted, all dates hereafter are June 2001 through May 2002.

erable by investigation or were specifically reserved from the settlement by mutual understanding of the parties." The settlement agreement in Case 27–CA–17679 is not in evidence and there is no evidence that the settlement agreement or other factors limit the applicability of *Hollywood Roosevelt.* Cf. *B & K Builders, Inc.*, 325 NLRB 693, 694 (1998). Thus, the settlement of Case 27–CA–17679 bars the litigation of the alleged violations in June and July, unless the Regional Director's action in vacating the settlement agreement is sustained. Accordingly, the merits of Cases 27–CA–17851 and 27–CA–17957 will be addressed first. I have not relied on presettlement actions in reaching a decision on Respondent's postsettlement conduct. For the reasons discussed later, some of the allegations of post settlement violations have merit. Next, the issue of whether the settlement agreement was properly set aside will be addressed. Finally, because the evidence establishes that the settlement agreement was properly vacated, the merits of the presettlement violations will be considered.

E. Postelection, postsettlement events

1. Complaint 5(h)—February 8 promulgation or repromulgation of a solicitation policy to discourage its employees from assisting the Union; Complaint 5(i)—February 8 threats of discharge or other discipline of employees if employees violated a solicitation policy; Complaint 5(j)—February 8 solicitation of complaints from employees regarding violations of a solicitation policy; Complaint 5(k)—February 8 written solicitation of complaints from employees who felt harassed or intimidated by another employee, without regard to whether the activity of the other employee was protected by the National Labor Relations Act

(a) Facts

The evidence is that a "Solicitation Policy" and an "Interoffice Memorandum" were documents posted on an employee bulletin board in the breakroom at the Store on February 8, where employees read it.

The "Interoffice Memorandum" was as follows:

INTEROFFICE MEMORANDUM

TO: ALL EMPLOYEES
FROM: PETE PALMER
SUBJECT: SOLICITATION REMINDER
DATE: 2/8/02
CC: MILT CHRISTENSEN

Please be reminded that this is a place of business and that working time is for work. City Market has a Solicitation Policy and a copy is attached.

If an employee violates the Solicitation policy they will be placing their job in jeopardy and will receive discipline up to and including termination.

If any employee thinks they are being solicited in violation of the Solicitation Policy or think they are being harassed or intimidated by another employee please let Devin or me know so we can put a stop to it.

Thank You.

Pete Palmer

The "Solicitation Policy" was a part of the Employer's personnel manual. The policy predated the union organizing campaign at the Store. The "Solicitation Policy" was as follows:

STORE PERSONNEL MANUAL—PAGE:S-*7–A–1 MASTER*
ORIGINAL DATE *10/9/95*—REVISED DATE_____
GENERAL OPERATIONAL GUIDELINES
SUBJECT SOLICITATION POLICY FOR ALL STORES

Working time is for work. Consequently, an employee may not during his or her working time solicit another employee. Working time does not include meal or break periods. In order to minimize litter and disruption to store operations, the following guidelines will govern solicitation and distribution of literature,

SALES FLOOR AREA

- No solicitation is permitted during hours when the store is open to the public. In addition, employees may not solicit during their working time or in a manner which interrupts the work of another employee.
- No distribution of literature is allowed at any time, except for authorized product promotions.

ALL OTHER AREAS

- Nonemployees may not solicit or distribute literature, except by permit as explained below.
- Employees may not solicit or distribute literature during their working time or in any working area in a manner which interrupts the work of another employee. Employees may not solicit or distribute literature in a manner that interferes with traffic or entry and exit from the store building or parking lot, or in a manner that involves unlawful conduct. Examples of unlawful conduct include harassment and disorderly conduct as defined in [S]tate criminal statutes.
- To prevent clutter, City Market may dispose of any discarded or unattended literature. There shall be no unlawful discrimination or contract violation regarding literature distribution.

PERMIT REQUIREMENT

Except for: (1) employee solicitation and distribution authorized above, and (2) authorized product promotions, no person or group may solicit or distribute literature inside or outside the store building on property (including parking lots) owned, leased, used pursuant to easement agreements (as with some shopping centers) or otherwise controlled by City Market or its affiliates, unless they first secure a written permit to do so. Permits shall be issued for retail store facilities only, by store managers. The number of permits per day may be limited by store managers. There shall be no unlawful discrimination against permit applicants.

The posting occurred following complaints to management by two employees regarding solicitations by union supporters. One of those employees had quit, telling Pete Palmer, manager of the Store, that one of the reasons she was quitting was that she did not wish to be involved in the organizing politics.

(b) Analysis

The General Counsel does not contend that the restrictions on solicitation and distribution in the 1995 policy were facially unlawful. Rather, the General Counsel contends that the posting of the policy was unlawful because of the timing vis-à-vis the upcoming representation election. An otherwise valid rule restricting solicitation or distribution violates the Act when it is promulgated to interfere with the employee right to self-organization rather than to maintain production and discipline. *Harry M. Stevens Services*, 277 NLRB 276 (1985), enfd. mem. 793 F.2d 1288 (5th Cir. 1986); *RCN Corp.*, 333 NLRB 295 (2001). Palmer conceded that the policy was posted in response to two employee complaints of organizing efforts by Union supporters. In the circumstances of the present case the posting of the policy violated the Act.

There is no evidence that the solicitation attempts that preceded the posting involved unlawful conduct or activity that was by its nature inherently unprotected. The Act protects persistent union solicitation even when it disturbs or annoys the employees who are solicited. *Cement Transport, Inc.*, 200 NLRB 841, 845–846 (1972), enfd. 490 F.2d 1024 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974); *Bank of St. Louis*, 191 NLRB 669, 673 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972). Under the rationale of the Board's opinion in *Harry M. Stevens Services*, supra, the General Counsel has established a prima facie case that the Respondent has failed to rebut. Thus, the evidence does not show that the policy was posted to maintain production and discipline. *Harry M. Stevens Services*, id. The fact that the policy dates from 1995 does not require a different conclusion. The record shows that the policy was in a management personnel manual, but not that the limitations in the policy had previously been imposed on the Store employees or communicated to them. Accordingly, the posting of the policy limiting soliciting and distributing by employees on behalf of the Union violated Section 8(a)(1).

The memorandum that was posted with the policy on February 8 cautions employees that they risk discipline and termination if they engage in union organizing activities in violation of the policy. Because the policy was an unprivileged restriction of protected activities by employees the threats of discipline and discharge violated Section 8(a)(1). Similarly, the request in the memorandum that employees report solicitation in violation of the policy violated Section 8(a)(1) because the limitations on solicitation were not privileged.

The request in the memorandum that employees report to management if they were subjected to undefined harassment or intimidation must be viewed in the context of the other unlawful aspects of the posting. The request would have the foreseeable effect of discouraging employees from engaging in protected solicitation, lest they place their employment at risk if other employees reported them for violating the unprivileged policy or for having engaged in protected conduct that the Respondent considered harassment or intimidation. The solicitation of reports of concerted activity by other employees under these circumstances violated Section 8(a)(1).

2. Complaint 5(l)—February 12 statement to employees by Palmer that the solicitation policy was posted in response to solicitation by the Union; Complaint 5(m)—February 12 statement by Palmer to an employee that solicitation for the Union was not allowed on employee breaktime; Complaint 5(n)—February 12 statement by Palmer to an employee that employees soliciting for the Union in violation of the solicitation policy could lose their jobs

(a) Facts

On about February 12, Palmer called employee Steffanie Sorenson into his office. Assistant Store Manager Devin Dahl was also present. Sorenson, Palmer, and Dahl described the conversation in their testimony. The central facts regarding the conversation as related by Sorenson were not refuted. To the extent that that there are inconsistencies between the testimony of Sorenson, in contrast with that of Palmer and Dahl, I found Sorenson to be the more credible witness regarding this conversation.

Palmer began by explaining that he wanted to tell Sorenson why the solicitation memo had been posted. He said that the memo had been posted because employees had complained of being harassed by people soliciting for Local 7. Sorenson asked who had complained and there was a discussion of the complaints. In discussing the reported complaints of one employee Sorenson asked, "Was it on a break? Was it lunch?" Palmer replied, "[W]ell, breaks are company time. You can't be soliciting on company time." Sorenson replied, "[L]unch hours are ours and we can talk what we want to about." Palmer then stated, "I know it's going on the clock, and I won't have employees harassed, and jobs could be lost if it continues."

The purported harassment described by Palmer did not involve Sorenson; she was not accused of having engaged in prohibited or inappropriate activities and she was not disciplined. Palmer testified that he addressed the issue with Sorenson because she was a leader in the organizing effort and that he considered her to be a good person to explain the reason for the posting of the solicitation memo. As the meeting concluded, Palmer repeated that the employees could not solicit on the clock and that if it happened, jobs could be lost. Sorenson was one of the most active employees in the union organizing campaign.

(b) Analysis

The evidence establishes that Palmer called Sorenson to a meeting in his office on about February 12, where she was told that she could not solicit for the Union on breaktime. This was clearly an unprivileged limitation of protected activity. See *Our Way, Inc.*, 268 NLRB 394 (1983). The Employer argues that no violation should be found because the restriction was imposed on only one occasion, was not part of the formal policy, that there is no evidence it was communicated to any other employee and no discipline was imposed for soliciting on breaktime. The Employers' arguments are not convincing. The violation was not an isolated instance of 8(a)(1) conduct, the instruction was never rescinded, and Sorenson was a known leader in the organizing effort. Thus, the limitation would have the foreseeable effects of interfering with the protected activi-

ties of a leader of the organizing effort and that the limitation would become known to other employees. Accordingly, the restriction on solicitation on breaktime violated Section 8(a)(1).

Palmer's statement that "jobs could be lost" for soliciting for the Union on the clock was unlawful because it was made in the context of his remarks that soliciting on breaks could be limited because breaks were on the clock. Moreover, for the reasons discussed supra, the posting of the policy restricting solicitation was itself unlawful. Accordingly the threat of job losses violated Section 8(a)(1).

Palmer's statement that the memo had been posted because employees had complained of being harassed by people solicited by the Union violated Section 8(a)(1) because it was made in the context of the unlawful limitation on organizing activity, thus conveying the message that protected activity was viewed by the Employer as being harassment that might be cause for discipline.

3. Complaint 5(o)–Implied threat to an employee by Palmer on February 19 of unspecified adverse consequences if the employee participated in activities in support of the Union; Complaint 5(p)—Threat by Palmer on February 19 to discharge employees for engaging in activities in support of the Union

(a) Facts

Lucille Seedorf was hired as a deli employee in February and was discharged in April. Initially she did not support the organizing effort, but became a supporter of the Union prior to her discharge. There is no contention that her discharge was union related.

Seedorf and Palmer testified about remarks Palmer made during Seedorf's employment interview. No one else was present. There are significant credibility issues regarding what was said. Both agree that Palmer discussed the union organizing effort. According to Seedorf, Palmer said that union people were trying to bring the Union in and that management did not want the Union, but that it should not affect her, but also said that she might be approached by the Union. According to Seedorf, Palmer described two former employees who had left because of union harassment and instructed her to report it to him if she was approached about the Union on worktime, because that was not proper.[4]

Seedorf testified that Palmer said that whatever her opinion was, either way, it would not affect her job and she told him she was neutral. According to Seedorf, Palmer said in substance that "these union people were leading themselves into the position where they would eventually—their activities would eventually cost them their jobs."

Seedorf testified that Palmer told her that one woman in particular that she would be working with named Ruth (later identified by Seedorf as Ruth Powell) was a strong union supporter, as were named two cashiers, whose names Seedorf could not recall based upon her recollection of Palmer's remarks. Seedorf testified, "I didn't find out about them until much later on while I was working." Seedorf never identified the two cashiers, but the implicit suggestion is that these two cashiers were leading union proponents Sorenson and Debra Sapp. Seedorf testified that Palmer's remarks related to the Union were made at the conclusion of the meeting, after she was hired.

Palmer's version of the hiring interview was that he explained to Seedorf that during the previous year there had been a union campaign, and that the City Market employees voted not to be represented by Local 7, but that they had filed unfair labor practice charges and that the process was not completed. Palmer testified that he told Seedorf that union supporters might approach her and that he told her that it was up to her whether to give them her address and phone number. Palmer specifically denied mentioning Powell, Sorenson, or Sapp; denied that he told Seedorf that two employees resigned because of the union; and denied that he told Seedorf that union supporters were doing things that could cost them their jobs.

Based upon considerations of demeanor and the probabilities, I find that Palmer's testimony was more credibly offered and more probable. I do not credit Seedorf's testimony that is inconsistent with that of Palmer regarding the employment interview.

(b) Analysis

The statements Palmer made to Seedorf during her employment interview that there had been a union campaign, and that the City Market employees voted not to be represented by the Union, that unfair labor practice charges and that the process was not completed, as well as his remarks that union supporters might approach her and that it was up to her whether to give them her address and phone number did not violate Section 8(a)(1). There is an absence of other credible and probative evidence of a violation during that conversation. Accordingly, I shall recommend that complaint paragraphs 5(o) and 5(p) be dismissed.

4. Complaint 5(q)—March 5 interrogation of an employee by Palmer regarding union activities by other employees

(a) Facts

At the time Lucille Seedorf began work employee Ruth Powell was on vacation. Seedorf testified that one morning after Powell returned from vacation Palmer passed Seedorf in the deli while she was working and said to her, "Have you heard anything?" to which she replied, "No, everything has been very quiet here," to which Palmer replied "Good." Seedorf testified that she interpreted Palmer's question as an inquiry whether Ruth had said anything to her about the Union. Palmer denied that the incident occurred.

In view of my findings regarding what was said in Seedorf's employment interview, it would not have been logical for her to assume that the question she attributed to Powell was an inquiry about the Union. In any case, based upon considerations of demeanor and the probabilities, I credit Palmer's denial of the conversation.

(b) Analysis

Because there is an absence of credible supporting testimony, I shall recommend dismissal complaint of paragraph 5(q).

[4] Seedorf initially testified that Palmer requested a report of solicitation at any time, but she amended that testimony.

5. Complaint 5(r)—March 15 failure to take appropriate action when employees threatened a coworker with adverse consequences if the coworker voted for the Union

(a) Facts

Seedorf described an incident in March in a backroom at the Store where she had gone on break. Seedorf testified that she entered the area where employees Sherry Wilson and Linda Cain were discussing the Union. Wilson had the title of assistant deli manager, but the record does not show her to be a statutory supervisor or agent of the Employer. No one else was present. Seedorf testified that she joined the conversation. She testified on direct examination.[5]

> I was going to my locker and I wasn't quite paying attention to what they were saying, because usually when they talked union I tried to get out real quick, but Linda said something, and—something about a vote and getting the Union in there to get this vote over with and their hemming and hawing, and I says well does that mean is that good to have this over with, and she says, well yeah. There's a notice on the board over there. I says well okay. Fine. I says well one way or another, I said the vote, you know, is—I can't remember. All right. She had said something about well we'll know how the vote goes because this is a small store, and we know how many people are working here, so if one vote goes out of the ordinary, in other words, for the Union and not against the Union, we'll know who voted that way and we'll take you and nail you to the wall. And I said well, it's a secret vote. Nobody knows who votes, and she repeated again, she says no, we know, because we know how many people are in the store. We know who is for the Union, who is against the Union, who the new people are. At that point, everybody started laughing. Pete [Palmer] passed by the breakroom, and he looked in and he said well it sounds like you girls are having a good time, and Sherry repeated the story to him and he just— . . . . Repeated what went on, the story about the vote and if one person voted for the Union, you know, if it went to the Union by one vote, they'd know who it was and nail her to the wall. Pete just laughed a little bit and said well that's not nice, and he walked away.

On cross-examination Seedorf testified as follows regarding the conversation with Cain:

> I said well even with the union vote, you know, when it's time to vote, it's a closed vote. You don't know who is voting for who. And she said to me well, that's where you're wrong because it's a small place and we know how many people are here and exactly how many are for the Union and how many are against the Union, and if one person, if the Union wins by one vote, we will take that person and nail her to the wall.
>
> . . . .
>
> I would think she was referring to a third person, whoever that person would be.

Wilson testified that she was training Seedorf and was present on several occasions in the breakroom with Seedorf and Cain. She acknowledged discussing the Union with Cain, but denied such discussions with Seedorf. She specifically denied that Cain made the "nail to the wall" remark described by Seedorf and testified that she had no recall of any conversation involving the three employees regarding the Union where Palmer was either in the breakroom or at the door. Cain testified to having been in the breakroom with Seedorf and Wilson and having discussed the Union with Seedorf, but denied having a conversation in which she made the "nail to the wall" remark described by Seedorf. Palmer did not testify regarding his involvement in the incident.

In resolving the issue of what happened in this conversation I found Seedorf's description on cross-examination of what Cain said to have been the more credibly offered and the most probable account, including her testimony that the remarks made by Cain were not directed at her. I credit Seedorf's testimony that Palmer stopped at the door and that the substance of the remarks described by Seedorf on cross-examination, quoted above, were related to him and that he chuckled and remarked "That's not nice." I specifically do not credit Seedorf's testimony on direct examination that she was told, "[W]e'll take you and nail you to the wall." In resolving the credibility issues I have considered the possible bias of Seedorf, who had been fired, the absence of testimony by Palmer regarding this incident, as well as the demeanor of all the relevant witnesses and the probabilities.

(b) Analysis

The credited evidence establishes that employee Cain had stated to employee Seedorf in the breakroom that if the Union won by one vote, the antiunion employees would know who that person was and would nail the voter to the wall, provoking laughter from those present; that Palmer then looked into the breakroom, commented on the laughter; the remark was related to him and he chuckled and said "that's not nice." The General Counsel contends that Section 8(a)(1) was violated on two theories. The first argument is that by not disciplining Cain, the Employer thereby condoned interference with Seedorf's rights. The second argument is that by not taking action against Cain, the Employer disparately applied the unlawfully promulgated solicitation policy.

An employer violates Section 8(a)(1) if it condones threats of physical violence or assaults by employees on other employees because of their union or antiunion sympathies. *Newton Bros. Lumber Co.*, 103 NLRB 564, 569 (1953); *Fred P. Weissman Co.*, 69 NLRB 1002 (1946), enfd. 170 F.2d 952 (6th Cir. 1948), cert. denied 336 U.S. 972 (1949). The Act imposes an affirmative duty upon an employer to insure that its obligation to maintain discipline in the plant and to provide its employees with the opportunity to work without interference from their coworkers is not delegated or surrendered to any union or antiunion group. *Newport News Shipbuilding*, 236 NLRB 1499, 1506–1507 (1978).

[5] Quoted testimony and documents in this decision are set forth verbatim. Corrections of spelling and grammar have been made only where essential and such corrections are noted.

The remarks that Cain made and the context, including the laughter of the employees that apparently led Palmer to look into the breakroom, is insufficient to establish that Palmer was put on notice that Cain had engaged in "unlawful conduct," the only limitation in the posting policy that would be relevant to threats.

Without reference to the solicitation policy, a preponderance of the evidence does not establish that the report to Dahl of what Cain said regarding the election, when viewed in context of the circumstances of the report, was so opprobrious that the employer had a duty to intervene.

In view of the foregoing, I find that the General Counsel has not established the violation and I shall recommend that complaint paragraph 5(r) be dismissed.

6. Complaint 5(s)—March 18 disparate application of the solicitation policy by failing to take appropriate action when informed that an employee had violated the policy while engaged in activity opposed to the Union

(a) Facts

In support of complaint paragraph 5(s) the General Counsel offered the following testimony by Seedorf:

> A . . . I was clocked—I was going into work. I was passing through the meat department, and Linda Cain approached me and said to me what's this I hear that you're going over to the Union side all of a sudden, and I just looked at her and I said well that's news to me, and I continued on my way to clock in. It bothered me so later on that day, I went to see . . . Devin Dahl, to speak to him because I was upset, and I had told him what happened and he said to me well don't worry about it. It, in no way, effects your job performances, but it does, because it's bothering me. I mean I'm feeling like I'm neutral and everybody knows I'm neutral. People are assuming I'm for Union, and now I'm being approached, and it's making me uncomfortable. He said well that shouldn't be and I'll bring it up. They were having—I—some kind of a meeting. I believe it was a management meeting or something like that. He said I'll bring it up and I'll tell them that this shouldn't be discussed.

Dahl described a different and more detailed version of the conversation. He testified that Seedorf approached him outside the breakroom and began telling him that Cain had said that Seedorf was changing her vote over to the Union and Seedorf expressed concern that it would affect management's opinion of her. Dahl asked her to come with him to the office. In the office the conversation continued and Seedorf reiterated her concern. Dahl testified that he told Seedorf that regardless of her opinion of the Union, it would not affect the Employer's opinion of her. According to Dahl he told her that if she felt that an employee was harassing her in any way she should talk to management and told her that he would remind the department heads in their weekly meeting that employees should respect each other. Dahl testified that he did address the issue at the next department head meeting.

Based upon considerations of demeanor and the probabilities I conclude that Dahl was attempting to accurately describe the conversation and that his recollection was better than that of Seedorf. I accordingly credit his version.

(b) Analysis

I find it unnecessary to address the question of whether the Employer would violate the Act for not enforcing the provisions of the unlawfully promulgated solicitation policy. The evidence does not establish that Seedorf related anything to Dahl that would put him on notice that Cain had done anything that violated the solicitation policy. While there is evidence consistent with Cain speaking to Seedorf while Cain was on the clock, the testimony does not establish that Dahl was so informed. There is no allegation that the remarks made by Dahl to Seedorf otherwise violated the Act. I shall recommend that complaint paragraph 5(s) be dismissed.

F. The Settlement Bar Issues

The settlement agreement in Case 27–CA–17679 approved on January 8, was intended to resolve charges that the Employer violated Section 8(a)(1) in June and July. The Employer contends that the settlement agreement was improperly set aside and that the settlement agreement bars a finding of unfair labor practices antedating the settlement agreement.

The consolidated complaint includes an order vacating and setting aside the settlement agreement pursuant to Section 101.9(e)(2) of the Board's Rules and regulations.[6] The stated reason for setting aside the agreement is that the Respondent violated the settlement agreement by engaging in Section 8(a)(1) conduct in February and March. The settlement agreement is not an exhibit and the record does not disclose the terms of the agreement.[7]

A settlement agreement generally disposes of all issues, with certain exceptions. See *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978). The Board's settlement bar rule is an affirmative defense and must be raised in the pleadings or at the trial; otherwise it is waived. See *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112 (1999). Here the Respondent has explicitly raised a settlement bar defense and the settlement bar question was placed in issue.

A settlement agreement can be set aside if its provisions are breached or if postsettlement unfair labor practices are committed. *R.T. Jones Lumber Co.*, 303 NLRB 841, 843 (1991). In determining whether there has been a breach of a settlement agreement or whether post settlement unfair labor practices are committed sufficient to set aside the agreement, mechanical or a priori rules are not applied. Rather, there must be an exercise of a sound judgment based on all the circumstances of the case, *Deister Concentrator Co.*, 250 NLRB 358, 359 (1980); and, more important, in order to "properly" set aside a settlement

[6] Sec. 101.9(e)(2) provides: "In the event the respondent fails to comply with the terms of an informal settlement agreement, the Regional Director may set the agreement aside and institute further proceedings." An "informal settlement agreement" is a specific type of Board settlement.

[7] On brief the General Counsel asks that notice be taken that the posting period for Board notices is 60 days. I decline to take the requested notice. A 60-day posting period is routine, but is not invariably required. See NLRB Case Handling Manual 10132.1.

agreement, the subsequent or continuing unfair labor practices must be "substantial," *Porto Mills, Inc.*, 149 NLRB 1454, 1470 (1964), and not "isolated," *Foodarama*, 260 NLRB 298, 299 fn. 2 (1982); *Coopers Local 42 (Independent Stave Co.)*, 208 NLRB 175 (1974). As noted in *Farm Fresh, Inc.*, 301 NLRB 907, 935 (1991), the question, in each case, is just what qualifies as "minor and isolated" or indeed "substantial." *Oster Specialty Products*, 315 NLRB 67, 70 (1994).

The General Counsel and the Union contend on brief that the settlement agreement was breached. While there is a standard form that is used for informal settlements (Form NLRB–4775), the form can be amended, See NLRB Case Handling Manual 10146.2. The notice that is customarily a part of an informal settlement agreement is not a standard form and is crafted to address the particular situation. Both the agreement and the notice are subject to negotiation. In the absence of evidence of the provisions of the settlement, I am unable to conclude whether the settlement agreement was breached.

The Respondent contends that the terms of the settlement agreement block setting the agreement aside until the merits of Cases 27–CA–17851 and 27–CA–17957 are fully adjudicated. In support of this contention the Respondent argues as follows on brief:

> Under the terms of the informal settlement, the agreement would only be set aside if the Employer engaged in any unfair labor practices for a period of one year from the date of the settlement. The events that allegedly occurred in the year 2002 have not been adjudicated to be unfair labor practices. The only basis the Government has to set aside the informal settlement are a series of unproven, unadjudicated allegations of unfair labor practices. This constitutes a procedural defect in the most recent hearing of this matter. A second hearing on whether the terms of the informal settlement had been violated should have been held when and only when, there had been a hearing on the unfair labor practice charges that allegedly occurred in 2002.

The Respondent cites no authority in support of this argument and it is not self-evident that such a provision in the settlement agreement would bar setting the settlement agreement aside. I need not reach the merits of the defense in the absence of evidence of the provisions of the settlement agreement.

While the record evidence does not establish that the settlement agreement was breached, the cases discussed earlier hold that an alternative ground for setting aside a settlement agreement can be the commission of postsettlement unfair labor practices. Based upon the substantial nature of the postsettlement unfair labor practices committed by the Respondent, which began shortly after the approval of the settlement agreement, I conclude that the agreement should be set aside. The unlawful posting of restrictions on solicitation and distribution on February 8, accompanied by threats to discipline employees and the request that employees to report concerted activity to management was particularly egregious, because it would have the foreseeable effect of interfering with the employees' exercise of their right to campaign in a rerun election. The unlawful restrictions on protected activity imposed in the meeting between Palmer, Dahl, and Sorenson on February 12, coupled with the threat that jobs could be lost, was not an isolated matter, since Sorenson was one of the leading Union proponents. Accordingly, I conclude that the settlement was properly set aside.[8]

G. Preelection, Presettlement Events

1. Complaint paragraph 5(a)—June 6 threats by John Hailey of the loss of benefits and wages

(a) Facts

The complaint alleges that at five meetings in June and July, admitted supervisors and agents made statements that violated Section 8(a)(1) of the Act. On June 6, the Respondent held a mandatory meeting of a small group of employees at a real estate office near the Store. John Hailey, a manager at another of the Respondent's stores and an admitted agent, conducted the meeting. Store Manager Pete Palmer was present. The employees were shown an antiunion video. Employee Steffanie Sorenson attended. She was at a total of about six such meetings. She described the video as depicting what union organizers would do during an organizing campaign. The General Counsel does not contend that the showing of the video was itself unlawful.[9] After the video was shown Hailey opened the meeting to questions. Sorenson and former employee Joyce Randall testified regarding what was said, as did Hailey and Palmer. Employee Justin Huber also attended an antiunion meeting at the real estate office, but could recall no details and the record does not establish that he attended the June 6 meeting.

Based on the totality of credibly offered and probable evidence and putting together a composite picture of what occurred, I reach the following factual conclusions regarding the June 6 events. In discussions following the video several employees voiced their views on the pros and cons of the Union, including the mention of job security, union dues, and negotiations. At one point Hailey held up a blank piece of paper and told the employees that in negotiations, "You start with a blank piece of paper and you negotiate. Three things can happen. You could get more. You could get less. Or you could get the same."

The testimony of Hailey and Palmer regarding what he said at the June 6 meeting was credibly offered and is consistent with the use of a blank piece of paper as a prop. The testimony

[8] A different conclusion is not warranted based upon the statement in the complaint that the settlement agreement was set aside because the agreement was breached. The issue of whether the agreement should be set aside based upon post settlement unfair labor practices was fully litigated. A different conclusion is also not warranted based upon the language in Sec. 101.9(e)(2) of the Board's Rules and Regulations that provides that a settlement agreement may be set aside because it has been breached. As demonstrated by the cases discussed above, the Board has held for many years, with court approval, that the commission of postsettlement unfair labor practices is an alternative ground for setting aside a settlement agreement without proof of a breach of the specific terms of a settlement agreement.

[9] Sorenson testified that the title of the videotape was "Promises, Promises." The record suggests, but does not establish, that the video was "Promises, Promises, Promises," a video discussed in *Parts Depot, Inc.*, 332 NLRB 670 (2000).

of employee witnesses that Hailey made certain other remarks has not been credited. Thus, I conclude, contrary to the testimony of Sorenson, that the credible testimony does not establish that Hailey said that negotiations start "at zero." Sorenson conceded that she had not attributed such a remark to Hailey when she described the incident at the hearing on objections. Randall's testimony that at this meeting Hailey specifically told the employees that during contract negotiations there would be no raises or vacations, that wages might be reduced to $6 per hour and that the employees could lose their insurance and other benefits was not convincingly offered, was not corroborated, and is not credited. As discussed later, there was a subsequent meeting where the possibility of wage reductions was addressed.

(b) Analysis

There are a number of reported decisions where the Board has addressed the lawfulness of statements by employers that bargaining "begins from scratch," "starts at zero," "starts with a blank page" or similar statements. The terms are synonymous. The principals to be followed in assessing the lawfulness of such statements under Section 8(a)(1) are found in the opinion in *Coach & Equipment Sales Corp.*, 228 NLRB 440, 440–441 (1977), where the Board states:

> "Bargaining from scratch" is a dangerous phrase which carries within it the seed of a threat that the employer will become punitively intransigent in the event the union wins the election. The Board has held that such "hard bargaining" statements may or may not be coercive, depending on the context in which they are uttered. Thus, where a bargaining-from-scratch statement can reasonably be read in context as a threat by the employer either to unilaterally discontinue existing benefits prior to negotiations, or to adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees for choosing collective representation, the Board will find a violation. Where, on the other hand, the clearly articulated thrust of the bargaining-from-scratch statement is that the mere designation of a union will not automatically secure increases in wages and benefits, and that all such items are subject to bargaining, no violation will be found. A close question sometimes exists whether bargaining-from-scratch statements constitute a threat of economic reprisal or instead constitute an attempt to portray the possible pitfalls for employees of the collective-bargaining process. The presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks. [Footnotes omitted.]

Hailey did not threaten to unilaterally discontinue existing benefits prior to negotiations. There were no contemporaneous threats or unfair labor practices that lend a threatening color to the remark. The postelection Section 8(a)(1) violations discussed, supra, occurred over 8 months later, following the election. In considering a similar employer statement in *Mediplex of Connecticut, Inc.*, 319 NLRB 281 (1995), the Board concluded:

> The Respondent's message to its employees that union representation was no guarantee of better benefits and might result in less desirable benefits, is legitimate campaign propaganda, which employees are capable of evaluating. Such expressions of views are protected by Sec. 8(c) of the Act.

The statements and use of the blank sheet of paper are not per se unlawful. The numerous cases cited by the General Counsel and the Union in support of their position on this issue have been considered.[10] In those cases there was a context, absent here, that rendered the remarks coercive. See *BI-LO*, 303 NLRB 749, 750 (1991), enfd. 985 F.2d 123 (4th Cir. 1992); *UARCO, Inc.*, 286 NLRB 55 (1987). I shall recommend dismissal of complaint paragraph 5(a).

2. Complaint paragraph 5(b)—June 21 threats by Phyllis Norris and/or Milton Christensen of the loss of profit sharing

(a) Facts

On June 21, there was a meeting of department managers at the Store. Phyllis Norris, Respondent's president and Milton Christensen, employee relations manager, conducted the meeting. Justin Huber, a statutory employee also attended the meeting. Huber was the Employer's scanning coordinator. Palmer invited him to the meeting.

At the Store the Respondent had a profit sharing plan for employees age 21 and over with a year of service. The Employer contribution was 5 percent of an employee's base salary. The profit sharing contributions became 20 percent vested at 3 years service and vested in additional 20 percent increments each year thereafter, becoming fully vested after 7 years. The vested portion of the profit sharing plan was paid to employees upon retirement or when they otherwise ended their employment. In addition, there was a 401(k) plan that was funded solely by employee contributions. The alleged threats during the June 21 meeting related to loss of profit sharing if the Union was voted in. Huber, Palmer, and Christensen described differing version of what occurred at the meeting.

Huber testified as follows as a witness for the General Counsel:

> A. [Norris] asked if there were any questions because there was a union campaign coming up and she wanted input from the department heads, I guess, and Brian asked if we vote the Union in will we lose profit sharing 401K, and she said no. It would be frozen during the time of negotiations. We would—the store would not contribute anything to profit sharing 401K during negotiations if the Union was voted in.
>
> Q. Did she say anything else that you can recall subject to benefits?
>
> A. I believe she said that benefit, that we would not get benefits during the time of negotiations. They would resume after negotiations, but they would be what we negotiated.

[10] Eg., *TRW-United Greenfield Division*, 245 NLRB 1135 (1979); *Centre Engineering, Inc.*, 246 NLRB 632 (1979); *Overnite Transportation Co.*, 334 NLRB 1074 (2001); and *Lear-Siegler Management Service*, 306 NLRB 393 (1992).

Q. Do you remember Milt Christensen saying anything on that subject?

A. I don't recall.

Palmer testified:

A. I believe Brian Bailey, who at the time was my grocery manager, brought up the subject about profit sharing and if the Union were brought in, if profit sharing—if City Market would still contribute to profit sharing.

Q. Was a response given?

A. Phyllis turned it over to Milt Christensen, and I think Milt implied that in the Grand Junction stores, if the Union had come in and City Market no longer contributed to profit sharing, but then again, he stated that everything had to be negotiated.

Q. Was there any discussion about what would happen to profit sharing during the negotiations?

A. I'm not for certain if there was.

Q. Did Phyllis make any comments about the profit sharing plan?

A. I'm not for certain.

Christensen testified as follows:

Q. Was there any discussion of the profit sharing plan?

A. One of the people at the meeting, I think it was Brian Bailey, asked a question, if the Union is voted in, what happens to our profit sharing plan, and can we keep the profit sharing plan?

Q. Okay. Was there a response to that question?

A. Yes, I responded.

Q. And what did you respond?

A. I told them that for whatever portion that you're vested, is always yours and nobody can ever take that away. That's always yours, no matter what. And as far as whether you can keep the profit sharing plan, that's negotiable. That would come down to negotiations. But that the fact was, that in the contracts that we had—City Market had with Local 7, the profit sharing plan had never been negotiated into any of those existing contracts.

Q. Was there any other discussion about profit sharing?

A. No, that was it.

Of the three versions quoted above, I credit the testimony of Christensen as being the more accurate account of who addressed the issue of profit sharing and of what was said. His testimony was detailed, convincingly offered, and seems probable. Palmer's recollection of the details was not as good. In contrast to Palmer and Christensen, Huber's testimony was offered in an unconvincing fashion and he was obviously confused regarding the distinction between the profit sharing plan and the 401(k) plan.

I found Huber's testimony that he "believed" Norris said that employees would not receive benefits during negotiations unconvincing, inconsistent with other credited testimony, and improbable. Accordingly, it is not credited. The complaint does not allege that such a statement was made at the June 21 meeting and the General Counsel has not urged that a violation be found based upon this testimony.

(b) Analysis

The credited evidence does not establish that any threat that employees would lose benefits was made in the June 21 meeting. Accordingly, I shall recommend dismissal of complaint paragraph 5(b).

3. Complaint 5(d)—Threats on or about July 18, 19, and 20 by Randy Griffin that benefits and wages, including profit sharing plan and insurance, would be lost

(a) Facts

On July 18, 19, and 20 Respondent's District Manager Randy Griffin conducted six or seven mandatory meetings of different groups of employees at the Store. At each of the meetings Griffin distributed a leaflet titled "Employee Questions About the Union, Part Two" that included the following:

> QUESTION: Could I lose wages and/or benefits if the union comes in?
>
> ANSWER: YES, you could lose wages and/or benefits as a result of negotiations with the UFCW. The union will tell you: "Don't worry because it is against the law for the Company to take away wages or benefits because you vote in the Union. Please be careful and listen carefully when the UFCW makes statements like this. True it is illegal for management to "take away wages or benefits as punishment for bringing in the union." But that is just clever wording to get around the real issue which is that employees can lose wages and/or benefits as the result of the bargaining (trading) process—*On any item or on the entire package, you could get more, the same as you had or LESS than you had when the negotiations started.* This is the real answer to the question–YES, you can lose.
>
> [Italics, capitalization and underlining in the original.][11]

Sorenson attended one of the meetings conducted by Griffin. She credibly testified that at that meeting Griffin held up a blank piece of paper and told the employees, "[In] negotiations, there are two sides. You sit down at a table and try and work things out together. You start out with a blank page. You could get more, less, or the same." Hailey testified that Griffin responded to an employee request for clarification by using an analogy of negotiation for the sale of a house. Hailey credibly testified that Griffin told the group that negotiations were similar to buying a house, in that a buyer has a certain price that he wants, and the seller has a certain price that he wants and usually the two settle in the middle somewhere, that neither side got what they want.

Credibly offered testimony of Griffin and Hailey establishes that the remarks made by Griffin regarding profit sharing were that the Union contracts that had already been negotiated at other stores did not include profit sharing, but if the Union did

[11] The entire handout is in the record, but there has been no contention that statements other than the quoted portion are evidence of unlawful threats.

come in, the employees profit sharing would still be there, and that the employees would receive the amounts that were vested when their employment ended. The employees were told that during negotiations profit sharing would "float."

Sorenson testified that she could not quote Griffin exactly, but that in substance he said that insurance would be "frozen" during negotiations, which could be 6 months or a year. In contrast, Hailey credibly testified that the employees were never told at this meeting that the Respondent would cease contributions for insurance.

Huber attended one of the three meetings conducted by Griffin. The date was not established. On direct examination and then on cross-examination he testified that he could not remember who was present, but later he testified that he never attended a meeting with Sorenson. He testified that Griffin distributed the handout and then held up a blank piece of paper and said, "[T]his is where you—you start with nothing, and then in negotiations, you can wind up with less, you can wind up with more, or you can stay where you're at currently during, after negotiations are concluded." Griffin denied the "start with nothing" remark described by Huber. I found Griffin to be a more credible witness on this issue and accordingly find that Griffin did not say that negotiations "start with nothing."

(b) Analysis

For the same reasons discussed earlier regarding the "blank piece of paper" remarks made by Hailey on June 6, the statements by Griffin while holding up a blank piece of paper were not unlawful. The General Counsel contends that the emphasis in the "Employee Questions" leaflet on the word "Less" warrants a different conclusion. I do not agree. Merely emphasizing that there was a possibility that negotiations could result in employees receiving less, while in the same sentence acknowledging that the employees could receive more, is insufficient to establish a violation of Section 8(a)(1). It is not unlawful for an employer to emphasize the possible downside of collective bargaining, so long as the argument, read in context does not amount to a threat. *Coach and Equipment Sales*, supra. Moreover, any coercive effect is more than counterbalanced by Griffin's statement that to the employees that in collective bargaining, as with selling a house, the parties usually "settle in the middle somewhere, that neither side got what they want." Thus, Griffin's remarks were consistent with good faith bargaining and an outcome where the Union was successful in achieving at least a part of what was sought. Indeed, this is a common outcome of good faith bargaining.

The statement by Griffin that insurance would be "frozen" during negotiation was, in context, no more than a statement that the Employer would not take unilateral action to change insurance. Thus, there is no evidence that the employees had any reason to conclude, based upon Griffin's remarks, that they would be denied expected insurance benefits during negotiations if the Union gained representative status. Cf. *Reno Hilton Resorts Corp*., 319 NLRB 1154, 1182 (1995), where a statement that previously announced insurance benefits would be frozen was found to violate Section 8(a)(1).

In the absence of credible and probative evidence that the Respondent threatened employees with the loss of wages or benefits at the July 18, 19, and 20 meetings, I shall recommend dismissal of complaint paragraph 5(d).

4. Complaint 5(e)—July 26 threats by Bruce Saunders and/or John Hailey that benefits and wages would be lost

(a) Facts

On July 26, there was a mandatory meeting of a group of employees at the Store. Employees Steffanie Sorenson and Dale Hampa and managers Saunders and Hailey testified about that meeting. Sorenson and Hampa were then apparently working a day shift. Saunders and Hailey agree that they were at the meeting described by Sorenson and Hampa. Their accounts differed somewhat from those of Sorenson and Hampa. Based on the totality of credited evidence and considering the demeanor of the witnesses and the probabilities, the following is a composite picture of what occurred at the July 26 meeting.

The same handout that had been distributed at the employee meetings on July 18, 19, and 20, discussed above, was distributed. In addition, the employees were shown a video and were given another handout titled "The Facts about Negotiations." There has been no contention that the handouts or the video were independently unlawful. The gist of the video was that unions were weak in negotiations and gave in to employers. The video is not in evidence. Following the video, one of the managers held up a sheet of paper and stated that negotiations began with a blank page and that the employees might end up with more, less, or the same. Saunders and Hailey each testified that Hailey ran the meetings they attended together and that in each of those meetings it was Hailey who used the blank sheet of paper. Based upon considerations of demeanor and the probabilities, I conclude that Sorenson and Hampa were incorrect in their recollection that Saunders was the person who held up the sheet and made this remark.

One of the employees asked what could happen if negotiations did not go well. Saunders stated that the Union could strike, the Union could abandon the employees, the Union might agree to a contract without it being ratified by the employees and that negotiations could possibly go on for 6 months or a year. He cited a situation at a City Market store in Alamosa, Colorado, where he said negotiations went on for over a year and that the Union then abandoned the unit. The record does not reflect that the statements regarding ratification and the Alamosa unit were untrue.

Saunders asked if everyone knew what an impasse was. Several employees offered definitions that demonstrated that they understood the term. Sanders raised the possibility that the employer might implement its last offer. Saunders described a hypothetical situation where the current wages were $7 per hour, the Union was seeking an increase to $8 and the Employer proposed $6 and the Employer's $6 proposal was implemented following impasse. Hampa said that he did not think that the Employer could do that and Sorenson agreed. Saunders asked Hampa if he was a lawyer. Saunders said that he was not a lawyer, but that he had the number for the National Labor Relations Board if they wanted to call them. Sorenson said that she had the number and was going to call the Board. Hampa stated that he was a family man and could not take a pay cut.

At that time Hampa was earning $10 per hour. Saunders said that as a family man, Hampa should do the right thing.

(b) Analysis

The "Employee Questions" handout, discussed in connection with the July 18–20 meetings, supra, was not unlawful. There is little detail regarding the video and it does not support a finding of a violation. There has been no contention and the evidence does not establish that the "Facts about Negotiations" handout was unlawful. The evidence regarding the obviously hypothetical situation posed by Saunders is insufficient to conclude that it was a threat that benefits and wages would be lost if the employees selected the Union to represent them. For the same reasons discussed earlier regarding the "blank piece of paper" remarks made by Hailey on June 6, similar remarks and the use of a blank piece of paper at the July 26 meeting were not unlawful. I shall recommend dismissal of complaint paragraph 5(e).

5. Complaint 5(f)—July 26 or 27 threats by John Hailey that benefits and wages would be lost

(a) Facts

About July 26 or 27, there was a mandatory meeting at the Store attended by a small group of employees. The exact date of the meeting was not established. Hailey conducted the meeting. Saunders and Palmer were present. Employees Sapp and Huber and Managers Saunders and Hailey testified about the meeting. Sapp and Huber were then working a night shift. Unless otherwise noted, the following is a composite picture of what the credible evidence shows occurred at this meeting.

The employees were shown a video regarding negotiations and a document was distributed, which Hailey challenged the employees to ask the Union to sign. The document contained "guarantees" by the Union as to what the Union would secure in negotiations. Hailey said that the Union would not sign, because the Union could not guarantee anything. The video and document are not in evidence and there has been no contention that they are independently unlawful.

Hailey asked if there were any questions. Following some discussion, Hailey held up a blank piece of paper. Sapp testified that when Hailey held up the piece of paper he said that negotiations started with a "clean slate." No other witness testified to hearing a reference by Hailey to a clean slate. (There is inconclusive evidence that at another meeting Griffin may have referred to a clean slate.) Sapp demonstrated poor recollection of the details of the meeting and it appears that the expression was her understanding of the import of what was said, rather than an actual recollection of Hailey's words. In contrast, Huber testified that Hailey "held up a blank piece of paper and said this is where you—you start with nothing, negotiations started with nothing." As with much of his testimony, Huber impressed me as being a witness attempting to tailor his testimony to support the Union and to relate his understanding of the import of what he had heard, rather than what was actually said. It seems more probable that Hailey said, as credible testimony establishes he said at other meetings, that negotiations start with a "blank page." However, in the absence of credible testimony establishing what Hailey said at this particular meeting regarding where negotiations started, I find that the General Counsel has not established what was said regarding that subject.

As at the July 26 meeting, there was discussion of the meaning of impasse. Hailey said that negotiations could take as long as 6 months or a year. I do not credit Huber's claim that Hailey said negotiations "would" take 6 months to a year. Hailey gave an example of negotiations regarding a unit of pharmacy technicians in Alamosa, Colorado who had voted in the Union, and after a year of negotiations an agreement could not be reached and there was an impasse and the Union had "walked away."[12] Sapp credibly testified that Hailey said that if there was an impasse the Employer could implement its final offer. Huber offered an embellished version that Hailey said that the final offer at Alamosa was less than those employees were then earning and that the Employer could have implemented the final offer, but did not. Huber's version was not corroborated by Sapp, is inconsistent with Hailey's more credibly offered testimony and is not credited.

(b) Analysis

There is an absence of credible testimony that Hailey threatened employees at this meeting with the loss of benefits or wages it they selected the Union or that the Respondent otherwise violated the Act at this meeting. Accordingly, I shall recommend dismissal of paragraph 5(f) of the complaint.

6. Surveillance: Complaint 5(g)—July surveillance by security guards

(a) Facts

During at least a part of the night shift when the Store was open for business no store manager or assistant manager was normally present. There was a night foreman, who may have been present, but the night foreman was an eligible voter in the election and the evidence does not show him to have been a statutory supervisor. Thus, at times when the Store was open at night no statutory supervisor or manager was present. Beginning in mid-June, about 6 weeks before the August 2 election, one security employee was assigned to work each night at the Store, limited to times when no supervision was present.

The Employer's work force includes security personnel. The security personnel who worked at the Store are supervised by Lead Investigator Catherine Stark, who works under the direction of management outside the Store. Ordinarily security employees were not assigned to work at the Store on a daily basis. Rather, Stark would assign a security employee to work at the Store once a week or once every other week, inferentially to address theft issues. In addition, security personnel were available to address specific problems.

The security employees at issue wore a nametag like other Store employees and there was nothing to distinguish their appearance from that of other employees. The employees were aware of the identity of the security employees. While at the Store the security employees loitered in the vicinity of the front entrance or sat at a picnic table in the parking lot and observed

[12] In fact, the Union had disclaimed interest in the Alamosa unit after efforts to reach a contract had been unsuccessful.

the front door. The evidence does not show that the security employees at issue were in nonpublic areas of the store.

The security employees were instructed to insure that persons coming into the store did not disrupt work. Their instructions regarding their interaction with store employees were that they could relate facts that they knew about unions, offer their opinions and provide examples of their experience with unions. The instructions included a prohibition on spying on employees.

The Employer had a written management policy, dated October 9, 1995, that prohibits solicitation or distribution of literature in the Employer's retail stores by nonemployees, absent special permission. The written policy is set forth in full supra, in the discussion of the posting of the policy on February 8, limiting employee soliciting. There is evidence that the management instructions regarding nonemployees had been enforced at other stores.

Employees Justin Huber, Debra Sapp, and Ruth Powell each credibly testified that an assigned security employee observed them while they were at work in the sales floor area from locations in the vicinity of the front entrance. Sapp testified that when she was on duty at a check stand at the front of the store, a security employee in the magazine area near her check stand watched as a nonemployee friend of Sapp talked with her. After the friend went to another location in the Store and engaged in a conversation with another unidentified person, the security employee approached Sapp and asked if she had been discussing union business and whether the person was a union person. Sapp answered no and explained that it was a nonemployee friend. The security employee then said "okay" and went back to the magazine rack.

Customer Louis Drakulich, a former police officer with experience in retail security, corroborated the testimony of Huber and Sapp regarding the activity of one of the night security guards. Drakulich testified that he spent a lot of time in the Store, at least one night a week. Drakulich knew Sapp and Huber and discussed movies with them when he visited the store. One night in about July he had a conversation with Sapp and Huber in an aisle of the Store where they discussed a movie. During the discussion, Drakulich remarked on the security employee, who was then watching them. Drakulich had never seen the security employee before, but he sensed that the person was involved in security, apparently a consequence of his years of experience in law enforcement.

(b) Analysis

The evidence shows and the Employer concedes that the presence of a single security employee on a daily basis beginning in mid-June was related to the scheduled election on August 2. Stark testified that the security personnel were at the Store to represent management when management was absent.

The General Counsel and the Union contend that the assignment of security employees was unlawful based upon the rationale of *Metal Industries*, 251 NLRB 1523 (1980); *Parsippany Hotel Management Co.*, 319 NLRB 114 (1995), enfd. 99 F.3d 413 (D.C. Cir. 1996); and *6 West Limited Corp.*, 330 NLRB 527 (2000), enfd. denied 237 F.3d 767 (7th Cir. 2001). Thus, it is argued that the use of the security employees was out of the ordinary and was in response to the union organizing activity and there was no legitimate reason for their presence. The Respondent contends that it was privileged to have a management representative on the premises to foreclose solicitation on its property by nonemployees under *Lechmere, Inc. v. NRLB*, 502 U.S. 527 (1992). The Respondent further contends that the employer did not violate Section 8(a)(1) when it observed its employees, citing *Roadway Package System*, 302 NLRB 961(1991). For the following reasons, I conclude that the Employer's increased use of security guards did not violate the Act.

The test for determining whether an employer engages in unlawful surveillance or unlawfully creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. *The Broadway*, 267 NLRB 385, 400 (1983) (citing *U. S. Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982)).

Management officials may observe public union activity on company premises without risking an 8(a)(1) violation unless such officials do something "out of the ordinary. *Metal Industries, Inc.*, 251 NLRB 1523 (1980). The evidence shows that the use of security employees by the Respondent was out of the ordinary and was admittedly related to the Union's organizing effort. The question is whether the use of the security employees was legitimate.

There is an inherent tension between an employer's property rights and the Section 7 rights of its employees. *First Healthcare Corp.*, 336 NLRB 646 (2001). The Board is required to seek a proper accommodation between Section 7 rights and private property rights. The accommodation between employees rights and employers' property rights must be obtained with as little destruction of one as is consistent with the maintenance of the other. *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). Accordingly, any tendency of the Respondent's increased use of security guards during the preelection period to interfere with the employees' rights must be balanced against the adverse impact on the Respondent's property rights if the increased use of security employees was not allowable in the circumstances of this case. I conclude that a violation has not been established.

Nonemployee union organizers had no right to enter the Store and the Employer was privileged to exclude them. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). To insure that nonemployee union organizers did not have free run of the Store at times when no managers or supervisors were present, the Employer used a single security employee like those routinely used for theft control. These employees were less likely to intimidate employees than would uniformed guards or contract personnel. The security employees stationed themselves where they could observe the public entrance and thus watch for nonemployee union organizers. There is no evidence that they attempted to observe employees in break areas or other nonpublic areas. Thus, the presence of the security employees was no greater than was reasonably necessary to achieve the Employer's legitimate objective of excluding nonemployee Union organizers. There is no evidence that they engaged in gratui-

tous intimidation and there was only one occasion where there was any mention of the union, discussed below. There is an absence of evidence of any actual surveillance of protected activity.

The close observation of Sapp and Huber while they had an extended conversation with Drakulich was consistent with the employer's right to exclude nonemployee union organizers. Drakulich, a trained observer, had never seen that security employee, so it is reasonable to infer that the security employee did not recognize Drakulich as being a legitimate customer. There is no contention that Sapp and Huber were engaged in their regular duties when they discussed movies with Drakulich. There was nothing in Drakulich's appearance that was inconsistent with the possibility that he was a nonemployee union organizer. Any interference with protected rights by the security employee was minimal.

Likewise, the conversation one security employee had with Sapp at her register was consistent with the legitimate duties of the security employee. There is no evidence that the conversation Sapp had with the unidentified friend was protected concerted activity. Since the Respondent was privileged to exclude nonemployee union organizers, the security employee was privileged to make reasonable inquiry when nonemployees came into the store and engaged working employees in conversation. Any interference with protected rights by the security employee was minimal.[13]

It has not been shown that the single security employee had more than a minimal impact on employee rights. In contrast, denying the Employer to have some representative of management on site would significantly impinge on the property rights of the Employer. Accordingly, the use of the security employees did not violate the Act. *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976); *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972). On the facts of this case a different result is not required because the Employer did not explain to employees the reason for the security employees. Cf. *6 West Limited Corp.*, 330 NLRB 527 fn. 7 (2000), enfd. denied 237 F.3d 767 (7th Cir. 2001). Accordingly, I shall recommend dismissal of complaint paragraph 5(g).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By posting of a policy limiting soliciting and distributing by employees to interfere with employees' right to self-organization the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By posting a memorandum threatening employees with discipline and discharge for violating an unlawfully promulgated policy limiting soliciting and distributing on behalf of the Union the Respondent violated Section 8(a)(1) of the Act.

5. By requesting in a memorandum that employees report solicitation in violation of an unlawfully promulgated policy limiting soliciting and distributing on behalf of the Union the Respondent violated Section 8(a)(1) of the Act.

6. By requesting in a memorandum that employees who felt harassed or intimidated by another employee report the matter to the Respondent without regard to whether the activity of the other employee was protected by the National Labor Relations Act the Respondent violated Section 8(a)(1) of the Act.

7. By telling an employee that the above-mentioned memorandum and policy had been posted because employees had complained of being harassed by people solicited by the Union violated Section 8(a)(1).

8. By telling an employee that solicitation on behalf of the Union during breaktime was prohibited the Respondent violated Section 8(a)(1) of the Act.

9. By threatening employees with discharge for soliciting on behalf of the Union during breaktime the Respondent violated Section 8(a)(1) of the Act.

10. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The Respondent has not otherwise violated the Act.

12. The Settlement Agreement in Case 27–CA–17679 was properly set aside by the Regional Director of Region 27.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Buena Vista, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Posting or enforcing against employees at the Buena Vista store the solicitation policy posted on February 8, 2002.

(b) Posting or enforcing against employees at the Buena Vista store the interoffice memorandum posted on February 8, 2002.

(c) Requesting that employees at the Buena Vista store report solicitation in violation of the solicitation policy and interoffice memorandum posted on February 8, 2002.

(d) Requesting that employees at the Buena Vista store who feel harassed or intimidated by another employee report the matter to the Respondent, without regard to whether the activity of the other employee was protected by the National Labor Relations Act.

(e) Telling any employee at the Buena Vista store that the solicitation policy and interoffice memorandum posted on February 8, 2002, was posted because employees had complained of

[13] There is no contention that the questions the security employee asked were violations. That question was not litigated and I draw no adverse inference because the Employer's did not call the security employee as a witness.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

being harassed by people, without regard to whether the activity of the other employee was protected by the National Labor Relations Act.

(f) Telling any employee at the Buena Vista store that solicitation on behalf of the Union during breaktime is prohibited.

(g) Threatening any employees at the Buena Vista store with discharge for soliciting on behalf of the Union during breaktime.

(h) In any like or related manner interfere with, restrain or coerce employees at the Buena Vista store in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions, which are necessary to effectuate the policies of the Act.

(a) Withdraw the interoffice memorandum and the solicitation policy posted on February 8, 2002, insofar as it applies to the employees at the Buena Vista store.

(b) Within 14 days after service by the Region, post at its Buena Vista retail store copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, while these proceedings are pending, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 8, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, California May 23, 2003

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WITHDRAW the posting of the interoffice memorandum and the solicitation policy that we posted at the Buena Vista store on February 8, 2002.

WE WILL NOT post or enforce against employees at the Buena Vista store the interoffice memorandum or the solicitation policy that we posted on February 8, 2002, limiting soliciting and distributing by employees on behalf of United Food and Commercial Workers, Local 7, AFL–CIO.

WE WILL NOT tell any employee at the Buena Vista store that the interoffice memorandum and solicitation policy that we posted on February 8, 2002, was posted because employees had complained of being harassed by people solicited by the Union.

WE WILL NOT threaten any employee at the Buena Vista store with discipline or discharge for violating the interoffice memorandum or the solicitation policy posted on February 8, 2002.

WE WILL NOT ask any employee at the Buena Vista store to report violations of the solicitation policy posted on February 8, 2002.

WE WILL NOT request that employees at the Buena Vista store who have felt harassed or intimidated by another employee to report the matter to us without regard to whether the activity of the other employee was protected by the National Labor Relations Act.

WE WILL NOT tell any employee at the Buena Vista store that solicitation on behalf of the Union during breaktime is prohibited.

WE WILL NOT threaten any employee at the Buena Vista store with discipline or discharge for soliciting on behalf of the Union during breaktime.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

DILLON COMPANIES, INC. D/B/A CITY MARKET, INC.

[15] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."